

NO. 47939-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN J. CHESTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence under CrR 3.6.

2. The trial court erred in entering that portion of finding of fact 7 that states defendant was stopped and questioned "based on the park official's observations of two men in the area illegally harvesting mushrooms" where no one saw these men harvesting mushrooms.¹

3. The trial court erred in entering conclusions of law 3-5 in support of its decision on the motion to suppress.

Issues Pertaining to Assignments of Error

1. Appellant was seized without a warrant for suspected unlawful mushroom harvesting in a state park. However, no one saw him harvest any mushrooms or in possession of any mushrooms, and the area in which he was seen searching for something on the ground was open to the harvesting of other edible plants. Did the trial court err when it found reasonable suspicion of criminal activity supporting the warrantless seizure?

¹ The court's findings and conclusions are attached to this brief as an appendix.

2. Several of the trial court's findings and conclusions in support of its denial of the defense motion to suppress evidence are not supported by the evidence or the law. Are they erroneous?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pacific County Prosecutor's Office charged Benjamin Chester with possession of a controlled substance (psilocybin) based on his alleged possession of psychedelic mushrooms. CP 1-4, 123. Defense counsel moved under CrR 3.6 to suppress evidence of the mushrooms, arguing that Chester had been detained unlawfully and the fruits of that detention – including the bag of mushrooms – had to be suppressed. CP 7-12. The motion was denied. CP 38, 45-48.

A jury found Chester guilty, and the court imposed a first-time offender waiver that resulted in 45 days' confinement, 30 days of which were converted to community service. CP 138, 146-147; 12RP² 10. Chester timely filed his notice of appeal. CP 157-158.

² This brief refers to the verbatim report of proceedings as follows: 1RP – 11/24/14; 2RP – 12/5/14; 3RP – 1/16/15; 4RP – 3/20/15; 5RP – 4/17/15; 6RP – 5/1/15; 7RP – 5/29/15; 8RP – 6/12/15; 9RP – 6/19/15; 10RP – 7/17/15; 11RP – 7/30/15; 12RP – 8/14/15.

2. Facts Pertaining to Motion to Suppress

The State called one witnesses at the CrR 3.6 hearing – Park Ranger Thomas Benenati. 7RP 9. Benenati works at Cape Disappointment State Park, an 1800-acre camping and day use park located in Pacific County. 7RP 10.

Benenati testified that, on November 22, 2014, Eric Wall – a non-commissioned park staff member – notified him that a gate in the park normally closed was found open. 7RP 13. The gate is marked “do not enter” and vehicles are not permitted to travel beyond that gate. 7RP 13. Pedestrians are permitted access, however. 7RP 17. Wall also reported seeing two men in the area who had crouched down and then fled when they saw Wall. 7RP 14.

According to Benenati, the area in the park where Wall had spotted the men is part of a larger area that had been closed to mushroom harvesting, and signs clearly indicated the closure.³ 7RP 11-14, 17. Wall had not reported seeing the two men picking or holding mushrooms. 7RP 36. But hallucinogenic mushrooms grow in this area of the park, Benenati had encountered collectors in the

³ WAC 352-28-030 regulates the harvest of edible plants on park lands and authorizes the closure of certain areas “to protect public health, safety, and welfare.” WAC 352-28-030(4).

past, and he suspected the two men might be collecting mushrooms. 7RP 15, 36-37. Because the mushrooms contain psilocybin, their possession is a class C felony. 7RP 15.

Benenati responded to the general area of Wall's report, a narrow roadway with significant brush and vegetation on either side, and drove down the pathway in his park vehicle looking for the men. 7RP 15-18. Benenati eventually spotted Chester, who was off the pathway, crouched down on all fours, and "rummaging through the leaf litter with his hands." 7RP 18. From Benenati's experience and training, this behavior can be associated with a search for mushrooms. 7RP 18. He did not, however, see Chester holding any mushrooms. 7RP 37-38. And this portion of the park was still open for harvesting of non-mushroom edibles. 7RP 40-41.

Benenati stopped his truck and got out to confront Chester. 7RP 18. Chester stood up, turned away from Benenati, and took several steps before Benenati told him to stop, which he did. 7RP 19. Benenati then asked Chester to come over to him, placed him in handcuffs, and told him he was being detained. 7RP 19, 23. Benenati felt the detention was prudent because he was investigating a felony, the area was secluded, and he did not know if there would be additional suspects. 7RP 26. Benenati could not say

that he saw any mushrooms before cuffing Chester. 7RP 38.

Benenati questioned Chester about what he was doing, but Chester did not respond. 7RP 19, 33. Within a yard from where Chester had been looking on the ground, Benenati found a bag containing freshly picked mushrooms. 7RP 19-22, 35. He then informed Chester that he was under arrest. 7RP 23. Benenati read Chester his Miranda⁴ rights, to which Chester provided an unintelligible response. 7RP 23-24. Chester initially declined to give his name, so Benenati described him to the clerk at the park office and asked if anyone matching that description had recently been in the office. The clerk indicated that someone matching Chester's description was registered at campsite 108. 7RP 23-24.

On the way to campsite 108, about 1/8 of a mile from the arrest scene, Chester said, "I'm going to jail anyway" and then provided his name to Benenati. 7RP 25. As they drove, they encountered two men on foot. Benenati asked Chester if he knew them and he responded that they did not look familiar. When Benenati spoke to them, however, they indicated that Chester was with them. 7RP 25. Benenati then took Chester to campsite 108 so

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

that he could retrieve his wallet. 7RP 25-26.

Defense counsel argued that Chester had been unlawfully detained without reasonable suspicion to believe he was committing the crime of illegally harvesting mushrooms. Because his warrantless detention was premature and unlawful, evidence of the mushrooms had to be suppressed. 7RP 45-49, 52-53. After hearing argument from both sides, the Honorable Michael Sullivan indicated he would not immediately issue a decision because he was not yet certain how he would rule. 7RP 54-55.

Several days later, Judge Sullivan entered a memorandum decision indicating he was denying the defense motion to suppress. CP 38. A few weeks later, he signed written findings of fact and conclusions of law proposed by the State. CP 45-48. Defense counsel submitted written objections. CP 57-119. Although Judge Sullivan indicated he would consider these objections, the original findings and conclusions remain unaltered. 10RP 4-11, 14; CP 45-48.

In his written findings and conclusions, Judge Sullivan concluded that Ranger Benenati had probable cause to believe Chester was harvesting mushrooms upon seeing him, the subsequent detention was lawful, and the collection of mushrooms

was permissible as either a search incident to lawful arrest or because Chester had abandoned the bag of mushrooms. CP 47.

At trial, Benenati testified consistently with his testimony at the pretrial hearing. 11RP 14-55. The State also called a forensic scientist from the state crime lab to confirm the collected mushrooms contained psilocybin. 11RP 56, 64-66. The defense called park aide Eric Wall. 11RP 68. Wall testified that when he saw the two men beyond the opened gate, one ran from him and the other casually walked away. 11RP 68-69. He did not see any mushrooms. 11RP 70. Moreover, neither man was Chester, whom he had never seen before. 11RP 71.

Chester now appeals.

C. ARGUMENT

RANGER BENENATI DID NOT HAVE REASONABLE SUSPICION TO JUSTIFY HIS WARRANTLESS SEIZURE OF CHESTER.

Under the Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution, warrantless searches and seizures are per se unreasonable unless the State demonstrates they fall within one of the "'jealously and carefully drawn exceptions'" to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting

Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)).

One of these narrow exceptions is the "Terry investigatory stop," discussed in detail in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968). During a Terry stop, an "officer may briefly detain and question a person reasonably suspected of criminal activity." State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995) (quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990)).

To justify an intrusion under Terry, however, an officer must be able to point to "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion." State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065 (1984) (quoting Terry, 392 U.S. at 21). Specific and articulable facts means that the circumstances must show "a substantial possibility that criminal conduct has occurred or is about to occur." State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). An officer's objective basis for suspicion must be particularized because the "demand for specificity in the information upon which police action is predicated is the central teaching of [the Supreme] Court's Fourth Amendment Jurisprudence." Terry, 392 U.S. at 22

n.18.

When reviewing the denial of a suppression motion, this Court must determine whether substantial evidence supports the trial court's findings of fact and then determine, under a de novo review, whether the findings support the conclusions of law. State v. Setterstrom, 163 Wn.2d 621, 625, 183 P.3d 1075 (2008); State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); State v. Hagen, 55 Wn. App. 494, 498, 781 P.2d 892 (1989).

As an initial matter, Chester was seized the moment Ranger Benenati, having parked and exited his truck, ordered him to stop as he began to walk away. See 7RP 18-19; CP 46 (finding 7). A person is seized "when, by means of physical force or a show of authority, his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter." State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotations and citations omitted).

Commands such as "halt," "stop, I want to talk to you," "wait right here," and the like qualify as seizures. See State v. Whitaker, 58 Wn. App. 851, 854, 795 P.2d 182 (1990), review denied, 116

Wn.2d 1028, 812 P.2d 103 (1991); State v. Ellwood, 52 Wn. App. 70, 73-74, 757 P.2d 547 (1988); State v. Sweet, 44 Wn. App. 226, 230, 721 P.2d 560, review denied, 107 Wn.2d 1001 (1986); State v. Friederick, 34 Wn. App. 537, 541, 663 P.2d 122 (1983).

Since Benenati did not have a warrant justifying this seizure, the next question is whether he had reasonable suspicion Benenati was engaged in the harvesting of mushrooms prior to the seizure. He did not. Wall, who first reported two men acting suspiciously in the area, did not see either man harvest or hold a mushroom.⁵ Moreover, there was no indication that Chester was with these two men. Benenati later found Chester on the ground and looking through the “leaf litter,” but he did not see anyone harvest or hold a mushroom, either. And while harvesting mushrooms was off limits in the area, any other edible plant or fruit could lawfully be gathered from the ground. See WAC 352-28-030(1)-(2). Without seeing the focus of Chester’s efforts, Benenati could not simply assume he was harvesting mushrooms. Yet that is what he did when – before finding the bag of mushrooms or seeing any in the immediate area –

⁵ Finding of fact 7 suggests that Wall observed the two men harvesting mushrooms. CP 46. There is no evidence, much less substantial evidence, supporting this finding. Wall did not report that the two men were harvesting mushrooms. See 7RP 36. There is no evidence he knew what they were doing.

he made it clear Chester could not leave.

The State will likely focus on the fact Chester turned and took several steps away from the site when he saw Ranger Benenati. See 7RP 19, 22; CP 46 (finding 6). While an individual's reaction to law enforcement is a relevant consideration, many such reactions are ambiguous. See State v. Soto-Garcia, 68 Wn. App. 20, 26, 841 P.2d 1271 (1992) (looking away as officer approaches not reasonable suspicion of wrongdoing), abrogated on other grounds, State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996); State v. Gatewood, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) (startled reactions to police presence, including "widening eyes" and walking away, do not amount to reasonable suspicion). That Chester began to walk away from Benenati did not provide reasonable suspicion by itself or in combination with anything else Benenati observed.

Judge Sullivan's conclusion (conclusion 3) that Benenati had probable cause to arrest Chester for harvesting mushrooms upon seeing him is incorrect. Ultimately, the State did not even establish specific and articulable facts justifying a warrantless intrusion; i.e., a substantial possibility Chester had been involved in criminal activity. Williams, 102 Wn.2d at 739; Kennedy, 107 Wn.2d at 6. Suspicions must be well-founded and reasonable. State v.

Doughty, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). This one was not. Therefore, conclusion of law 4 (indicating a lawful arrest and lawful confiscation of the mushrooms incident to arrest) also fails.

Alternatively, Judge Sullivan found that Chester had abandoned the bag of mushrooms and therefore had no reasonable expectation of privacy regarding them. CP 47 (conclusions of law 4 and 5). Judge Sullivan cites two cases in support: State v. Poling, 128 Wn. App. 659, 116 P.3d 1054 (2005) and State v. Dugas, 109 Wn. App. 592, 36 P.3d 577 (2001).

A defendant has automatic standing to challenge a seizure when (1) possession is an essential element of the offense and (2) the defendant was in possession of the contraband at the time of the contested seizure. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (citing State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980)). That is the situation here.

As for abandonment, generally police may retrieve voluntarily abandoned property without violating an individual's constitutional rights. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994); State v. Whitaker, 58 Wn. App. 851, 853, 795 P.2d 182 (1990), review denied, 116 Wn.2d 1028, 812 P.2d 103 (1991).

This is because a defendant has no privacy interest in property that has been voluntarily abandoned. Evans, 159 Wn.2d at 407-408. But the State did not show abandonment here.

“Voluntary abandonment is an ultimate fact or conclusion based generally upon a combination of act and intent.” Evans, 159 Wn.2d at 409 (citing 1 Wayne R. LaFave, Search and Seizure sec. 2.6(b), at 574 (3d ed. 1996)). “Intent may be inferred from words spoken, acts done, and other objective facts, and all the relevant circumstances at the time of the alleged abandonment should be considered.” Id. (quoting State v. Dugas, 109 Wn. App. at 595). The relevant inquiry is whether the defendant, in leaving property, relinquished his reasonable expectation of privacy. Id. This Court reviews the issue of abandonment de novo. State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001).

Here, Chester never left the property at issue. Although he turned away from Benenati and *began* to walk away from the bag, he stopped after several steps and then returned to speak with Benenati upon being asked to do so. Thus, there is no indication in the record that he was ever more than a few yards from his bag. Compare State v. Young, 86 Wn. App. 194, 197, 201, 935 P.2d 1372 (1997) (defendant voluntarily abandoned property where,

after being illuminated by officer's spotlight, he walked rapidly toward trees, tossed the property behind the tree, returned to the sidewalk, and walked away from area), aff'd, 135 Wn.2d 498, 957 P.2d 681 (1998). Nor is this a case where Benenati denied ownership of his bag. Compare Reynolds, 144 Wn.2d 284-285, 291 (jacket abandoned where found placed underneath automobile and defendant expressly denied ownership).

Judge Sullivan's reliance on Poling and Dugas was misplaced. Poling recognizes that individuals have a legitimate privacy interest in their homes, but that police officers may enter areas of the curtilage that are impliedly open. Poling, 128 Wn. App. at 667. In Dugas, Division One found that the defendant had not relinquished his expectation of privacy in the contents of his jacket by leaving it on the hood of his vehicle. Dugas, 109 Wn. App. at 596. Although not entirely clear, it appears these cases were cited in the State's proposed findings and conclusions simply for the proposition that a defendant must have a reasonable expectation of privacy in the item searched (rather than for their facts). For the reasons already discussed, Chester has demonstrated that he retained an expectation of privacy in his bag and its contents. They were never abandoned.

Any evidence or statements derived directly or indirectly from an illegal seizure must be suppressed unless sufficiently attenuated from the initial illegality to be purged of the original taint. Wong Sun v. United States, 371 U.S. 471, 484-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Warner, 125 Wn.2d 876, 888, 889 P.2d 479 (1995); State v. Chapin, 75 Wn. App. 460, 463, 879 P.2d 300 (1994), review denied, 125 Wn.2d 1024, 890 P.2d 465 (1995). Ranger Benenati located the bag of mushrooms immediately following, and as a result of, Chester's unlawful seizure. The State made no attenuation argument below and there is no such argument that can be made convincingly. The evidence should have been suppressed.

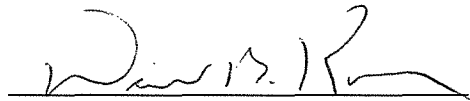
D. CONCLUSION

Chester was seized without reasonable suspicion of criminal activity and retained a privacy interest in his bag. All evidence discovered following the illegal seizure, including the bag and its contents, should have been suppressed. Chester's conviction must be reversed.

DATED this 8th day of January, 2016.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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APPENDIX

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VIRGINIA LEACH, CLERK
PACIFIC COUNTY, WA

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SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

BENJAMIN J. CHESTER,

Defendant.

NO. 14-1-00232-5

FINDINGS OF FACT
CONCLUSIONS OF LAW

At the Defendant's request, a CrR 3.6 hearing was conducted on May 29, 2015. The Court, after fully considering the evidence presented, arguments of counsel, and being fully advised on the matter, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

Based on the evidence provided the Court hereby finds the following facts:

1. November 22, 2014, Benjamin J. Chester, the Defendant herein, was within the boundaries of Cape Disappointment State Park ("the Park"), which is a Washington State Park governed accordingly.
2. Portions of the Park had been closed to all mushroom harvesting and signage was posted closing those portions of the Park. The park signs and closures

FINDINGS OF FACT
CONCLUSIONS OF LAW AND
VERDICT — PAGE 1 OF 4

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- 1 were publicized and photographs were admitted by the State at the hearing and
2 are included hereby reference. The Defendant was observed in the area of the
3 Park which was then closed to mushrooms harvesting. Anyone entering the
4 Park would have passed a sign which indicated the portions of the Park closed to
5 mushroom hunting and the Defendant passed by at least two additional signs
6 stating that the Park is closed to mushroom hunting.
7
- 8 3. A Park Aide, employed by the Park, observed an open gate which was located
9 off a side road in the Park that was closed to vehicle traffic. Shortly thereafter,
10 the Park Aide observed two men in this closed portion of the Park. The men ran
11 from the Park Aide, who subsequently alerted Park Ranger Benenati. This
12 portion of the Park was closed to motor vehicle traffic.
13
- 14 4. Ranger Benenati responded to the scene and drove his patrol vehicle into the
15 area. The area is a densely wooded area with deep foliage.
16
- 17 5. Ranger Benenati observed a man, later identified as the Defendant, on his
18 hands and knees intently going through the leaf debris in a manner consistent
19 with a person who was harvesting mushrooms. This area was closed to such
20 harvesting.
21
- 22 6. The Defendant observed Ranger Benenati's patrol vehicle, stood up and began
23 walking in the opposite direction from the Officer.
24
- 25 7. The Defendant was ordered to stop, did stop, was cuffed and briefly detained for
26 questioning based on the park official's observations of two men in the area
illegally harvesting mushrooms who fled from a Park Official.
8. Within either a yard or arm's length of the Defendant's initial location, Ranger


1 Benenati observed a bag containing freshly picked mushrooms. The bag
2 appeared to have been only recently in that area. Mr. Christian was not observed
3 to be actual possession of the bag containing the mushrooms.

- 4 9. Ranger Benenati has particular training and experience with mushrooms and has
5 worked with the Washington State Crime Lab to secure collections of
6 mushrooms. Further, Ranger Benenati also has formal training as a botanist
7 and can identify that the mushrooms in question were recently harvested.
8 Ranger Benenati's testimony is incorporated herein by reference.
9

10
11 CONCLUSIONS OF LAW AND DECISION

- 12 1. This Court has jurisdiction over this action.
13
14 2. Mr. Chester was in a portion of the Park closed to the harvesting of any
15 mushrooms.
16 3. Based on the totality of the testimony presented at the CrR 3.6 hearing, which is
17 herein incorporated by reference, there was probable cause to believe that Mr.
18 Chester was in the process of illegally harvesting mushrooms when observed by
19 Ranger Benenati.
20 4. Ranger Benenati's detention of Mr. Chester was lawful and any search was
21 permissible as either incident to arrest or of property abandoned by Mr. Chester.
22 5. Mr. Chester has failed to demonstrate that he had a reasonable expectation of
23 privacy in the item searched pursuant to *State v. Poling*, 128 Wash.App. 659,
24 116 P.3d 1054 (2005); *State v. Dugas*, 109 Wash.App. 592, 36 P.3d 577 (2001).
25
26

Decided and signed July 15, 2015.


Judge Michael J. Sullivan

Presented by:

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And by:

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FINDINGS OF FACT
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VERDICT — PAGE 4 OF 4

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 47939-7-I
)	
BENJAMIN CHESTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF JANUARY 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] BENJAMIN CHESTER
8605 WALLINGFORD AVENUE N.
SEATTLE, WA 98103

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF JANUARY 2016.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

January 08, 2016 - 3:15 PM

Transmittal Letter

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Case Name: Benjamin Chester

Court of Appeals Case Number: 47939-7

Is this a Personal Restraint Petition? Yes ☐ No

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